IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,

DARRYL ANDERSON, et al.,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO.**
v.	§	**1:06-cv-01000-MEF-WC**
	§	
PERDUE FARMS , INC.,	§	
	§	
Defendant.	§	
	§	

RESPONSE TO DEFENDANT'S MOTION TO LIFT ORDER STAYING DISCOVERY

Comes now Plaintiffs and respectfully request that this Court continue to stay discovery pending the Court's determination on court supervised notice. In support of this motion Plaintiffs show the following:

1. Plaintiffs filed their Reply to Defendant's Response in Opposition of Court Supervised Notice on January 22, 2008. The notice issue is now fully briefed.

2. Defendant's Motion to Lift Order Staying Discovery is essentially a motion for reconsideration.

3. Defendant would like this Court to believe that Plaintiffs advocate the use of the 11th Circuit's *Hipp* analysis in order to rush to judgment on notice because their proffered declarations have no evidentiary value.

4. This simply is not the case. Within Plaintiffs' Reply brief (Dkt. No. 63), Plaintiffs clearly show that a colorable basis for their claim exists and as such the Court need not make credibility determinations or resolve factual issues at this initial stage of the litigation. *See* Pltf's Reply, Dkt No. 63 at ¶¶ 5 – 19, ¶¶ 28 - 36. Furthermore, Plaintiffs' Reply brief shows the proffered declarations in support of notice are accurate and it is Defendant who is not being completely upfront with the Court. At this stage deposition testimony is not necessary and it is not maniacal for Plaintiffs to expect a speedy decision on notice.

Defendant has not made attempts to ensure it remains compliant with the FLSA in the last 5.5 years. *See* Pltfs' Reply, Dkt. No. 63 at 7, fn. 3. This in itself could be interpreted as a violation of their consent judgment. *See* Def's Response, Dkt. 59, Exhibit B Tab 1 at 3, ¶ C (Pursuant to the Consent Judgment entered into by Defendant, Defendant is obligated to use its best efforts to maintain future compliance with the FLSA). Defendant conveniently blindly follows an outdated settlement agreement with the

DOL, which has no legal precedent, and somehow they expect the Court to find Defendant more credible than Plaintiffs. Defendant's settlement is no different than any other settlement involving a civil action brought by a private party; if the law changes after you enter into a settlement and you make procedural changes as a result of that settlement, you are still required to comply with precedent setting cases, such as decisions of the United States Supreme Court. Defendant's reliance on the consent judgment is only good for one thing, an argument that Defendant did not act willful under the Act. In fact, from the documents provided by Defendant, it does not appear Defendant even sought an opinion from the DOL with regard to their continued reliance on the 2002 agreement in the post *Alvarez* world.

5. Defendant would like to make Plaintiffs out to be the "bad guy" stirring up litigation and wrongly seeking notice but Plaintiffs are simply protecting putative class members and Plaintiffs are not asking for anything out of the ordinary. In the 11th Circuit, Judge Clay D. Land, presiding over an MDL action with a putative class of more than 200,000 individuals, *In re: Tyson Foods, Inc. Fair Labor Standards Act Litigation*, MDL Dckt. No. 1854, Case No. 4:07-MD-01854, found, ruling from the bench, that Defendant is not entitled to pre-notice discovery. *See* Exhibit A (Hearing

Transcript, pg. 43 lines 12 – 25, pgs. 44 – 46, pg. 49 lines 3 – 25 and pg. 93 lines 11 - 13). In deciding a briefing schedule for notice and whether defendant will be allowed to conduct pre-notice discovery, Judge Land states,

> "I'm going to follow the *Hipp* rule… I would think, unless there's some extremely unusual circumstance, the initial certification decision will be decided based upon the well-pled allegations of the complaint." *See* Hearing Transcript pg. 49 lines 3 – 8.

Judge Land went on to determine discovery should not commence until the last reply brief regarding conditional certification is filed. *See* Hearing Transcript pg. 56 lines 4 – 7. During the course of oral arguments Judge Land went as far as to accuse defendant's request for discovery as being nothing more than hoops which they were trying to make Plaintiffs needlessly jump through and that defendants would not suffer any prejudice as a result of discovery being issued without further discovery. *See* Hearing Transcript at pg. 43 lines 17 – 25, pg. 44 lines 1 – 3 and pp. 43 – 45. Subsequently, defendant consented to court supervised notice and an order reflecting defendant's consent was entered. *See In re: Tyson*, 4:07-MD-01854, Doc. 29.

Likewise, after briefing on the issue, Judge Harry F. Barnes presiding

over an MDL action with a putative class of more than 150,000 potential members, *In re: Pilgrim's Pride Fair Labor Standards Act Litigation*, MDL Dckt. No. 01:07-cv-1832, also found discovery is not necessary at the initial stage of the certification process stating,

> "The Court indicated… it would be appropriate to allow the parties to engage in discovery relating to collective action certification issues. However, upon further consideration, the Court has decided that discovery is not necessary at the initial stage of the certification process… The Court is aware that sending notice early in this proceeding is critical under the Fair Labor Standards Act because the statute of limitations continues to run until individuals affirmatively opt-in to the action." *See* Plntfs' Motion for Notice, Dkt. 49, Exhibit 10.

6. Defendant acts put upon that under the *Hipp* analysis the initial notice stage is more lenient than the second stage analysis but the reason for this more lenient standard at the initial stage is plain and it is simple. As a trade off Defendant does not face a Rule 23 class action where the statute of limitations are tolled for all potential class members upon filing the complaint and Defendant does not have to face a Rule 23 opt-out class. Clearly from a class participation stand point the law provides Defendant many advantages and the only reasonable expectation under *Hipp* as a counter to this advantage is that plaintiffs receive timely notice of an action that may affect their rights. But Defendant wants to have its cake and eat it

too. Defendant wants the benefits of a 216(b) collective action combined with the upfront discovery of a Rule 23 class action. Under *Hipp* this hybrid does not exist.

Thus, as Plaintiffs have said before, the genius of *Hipp* is that opt-in rights are protected and Defendant is protected in it is allowed full discovery at the second stage analysis.

7. No doubt, if the Court grants Defendant's motion, Defendant will use the discovery and depositions it requested to attempt to prematurely move this action to the second stage analysis under *Hipp* before full blown discovery has occurred and the record is complete and as a result Plaintiffs, Opt-in Plaintiffs and putative class members will be prejudiced, as this Court astutely observed in its December 20, 2007 Order staying discovery.

8. The notice issue is fully briefed, Defendant's have had an opportunity to submit affidavits and supporting evidence same as Plaintiffs, and as such a decision on notice is appropriate now rather than later.

9. As for Defendant's posturing in this case regarding summary judgment, in *Alford v. Perdue Farms* Defendant's filed a motion for summary judgment and Plaintiffs submit that Defendant invariably did not even use the depositions it requested to support its Statement of Undisputed

Material Facts in support of summary judgment. *See Alford*, 5:07-cv-0087, Dkt. 41. The motion for summary judgment was filed after delaying a decision on notice now almost seven (7) months so Defendant could depose a representative sample of plaintiffs' declarants and in turn a single 30(b)(6) representative was put up for deposition. Defendant's statement of alleged undisputed material facts supporting its summary judgment motion is premised on newspaper articles, the declaration of the internal auditor charged with wage & hour compliance and the declaration of Perdue's Vice President of Human Resources. After a 7 month delay in notice proceedings Defendant didn't even rely on the deposition testimony it requested to develop undisputed material facts which quite expectedly are disputed. Scores of individuals potentially lost their right to join that litigation during this delay and the Court in *Alford* is being forced to make merit based determinations at the notice stage without a complete record before it.

10. Surely Defendant cannot expect the Court to delay a decision on notice in this case which likewise prejudices potential opt-in plaintiffs. No, instead it is appropriate to move forward with notice pursuant to *Hipp* and if notice is granted the parties engage in full discovery and develop a

complete record upon which a motion for summary judgment or motion to decertify can be fairly judged.

11. *Hipp* cannot be vacated simply because Defendant threatens to file a motion for summary judgment. The purpose of *Hipp* will be frustrated and *Hipp* could be rendered useless because defendants will file or threaten to file motions for summary judgment based on incomplete records simply to delay the proceeding in order to reduce the putative collective class.

12. Plaintiffs request that the discovery stay remain in place until a decision on notice is rendered by the Court consistent with the Court's previous order. Plaintiffs propose that after such a decision is rendered the parties meet and submit a revised discovery plan within 10 days of the Court's order, reflecting changes that may be necessary as a result of the Court's order.

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully request that this Court as soon as practicably possible deny Defendant's Motion to Lift the Discovery Stay and grant Plaintiffs' motion for an order permitting court supervised notice to employees of their opt-in rights.

Dated: January 24, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2008, I electronically filed Plaintiffs' Response with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE: TYSON FOODS, INC. FAIR LABOR STANDARDS ACT LITIGATION	CASE NO. 4:07-MD-01854 (CDL) DATE: 11/14/2007 PRETRIAL CONFERENCE

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE CLAY D. LAND,

UNITED STATES DISTRICT JUDGE

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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(Proceedings on 11/14/2007, commencing at 10:03 a.m., as follows:)

THE COURT: Please be seated. Good morning.

All right. This will be the initial pretrial conference in the case of In Re: Tyson Foods, Inc., Fair Labor Standards Act litigation, MDL No. 407-MD-01854.

Welcome to the Middle District, those of you who have never been here before. Hopefully, we can accommodate everybody this morning and get done what we need to get done in an efficient manner.

I have reviewed the filings by both parties, both the defendant's proposed suggested scheduling order along with the plaintiffs' proposals and responses. I suppose the first thing we need to do is find out who is going to be speaking today on behalf of the plaintiffs.

Who would that be?

MR. SELLERS: Your Honor, I'm Joseph Sellers. I plan to speak today. Mr. Maniklal, who is here with us, may speak as well if that -- may permit the Court.

THE COURT: All right. Mr. Sellers and Mr. Maniklal.

MR. MANIKLAL: Yes, sir.

THE COURT: All right. And who's going to be the spokesman today for the defendants primarily?

MR. MUELLER: Good morning, Your Honor.

Michael Mueller with Akin, Gump, Strauss, Hauer and Feld. I'm proposed lead counsel. With me is Li Schreter. She's proposed liaison counsel.

THE COURT: All right. Very good.

MR. MUELLER: Li is with Littler Mendelson in Atlanta.

THE COURT: All right. I am generally familiar with the issues in the litigation, but before we get into the specifics of the scheduling order, I do have a few questions that I wanted to get straight in my mind.

One is, are all of the cases that are presently pending in this MDL now single-plant cases, or not? Mr. Sellers?

MR. SELLERS: Yes, Your Honor.

THE COURT: All right.

MR. SELLERS: All of the cases are single-plant cases, with the exception of the Adams case, that was originally filed in the Western District of Arkansas. That involves multiple plants, all of which are in Arkansas.

THE COURT: All right. So the Adams Arkansas case is a multiplant case.

MR. SELLERS: That is correct.

THE COURT: All right. Have any of the cases been -- I think I know the answer to this, but I just

want to make sure. Have any of the cases been certified yet in any of the transfer of courts? Have there been any certifications, either conditionally or --

MR. SELLERS: No, Your Honor.

THE COURT: No. All right.

In any of the cases, has the certification -- was the certification issue fully briefed in any of the cases; in other words, it was briefed -- all the briefs were in, it just hadn't been decided as of the time of the transfer?

MR. SELLERS: No, Your Honor.

THE COURT: All right. And for the unionized plant cases, has the Section 203(o) issue been fully briefed in any of the cases?

MR. SELLERS: No, Your Honor.

THE COURT: All right. And how many of the cases -- there are 18, correct, presently?

MR. SELLERS: That is correct.

THE COURT: How many of the cases have had no discovery; in other words, they were just sent here -- they were sent to MDL right after they were filed and then they were sent here. Most of them or --

MR. SELLERS: Yes, Your Honor. I think about 11 --

THE COURT: Okay.

MR. SELLERS: -- out of the 18 have had no formal discovery.

THE COURT: All right. So the only ones where there's really been discovery are the ones that came from the Northern District of Alabama, that were severed and then refiled in various division -- districts.

MR. SELLERS: Well, Your Honor, there was originally a single case in the Northern District of Alabama.

THE COURT: Right.

MR. SELLERS: The magistrate judge there allowed discovery with respect to the plants at which the named plaintiffs had worked. So there were -- as to those plants, where the named plaintiffs in that case had worked, there has been formal discovery. With respect to all the other cases, that were brought by others who may have opted into that case and have since had their claims dismissed without prejudice, permitting them to refile new cases, no formal discovery has been conducted as to those cases.

THE COURT: Okay. And in those northern Alabama cases where there was discovery, and then those named plaintiffs have now gone and either participated in or filed plant -- single-plant cases, are those Alabama cases or are those scattered about?

MR. SELLERS: They're scattered, Your Honor. Perhaps --

THE COURT: There's some in Georgia, aren't there?

MR. SELLERS: That's correct.

THE COURT: Okay.

MR. SELLERS: And there's some in other places.

The named plaintiffs who were in the Alabama case were -- several of them were from Alabama plants, but they were also from plants elsewhere in the country.

THE COURT: So there's seven cases scattered throughout the 18 where there's been some discovery.

MR. SELLERS: Yes, Your Honor. They are from -- in addition to Alabama, they're Kentucky, Indiana, Missouri, Georgia, Maryland, and Mississippi.

THE COURT: But not all of the cases in those districts.

MR. SELLERS: That's correct.

THE COURT: Okay. Which -- let's start -- and I'm working off of my -- the Schedule A to my first order that we sent out, where we listed the cases by district, Schedule A to the original order that we sent out.

MR. SELLERS: Your Honor, may I address the Court sitting so I can --

THE COURT: Yes, you may.

MR. SELLERS: Thank you.

THE COURT: Can you tell fairly easily -- can you go through these fairly easily and tell me which cases there has been some discovery?

MR. SELLERS: Yes.

THE COURT: All right. Let's start with the Northern District of Alabama.

MR. SELLERS: There are none that have had formal discovery on that -- of those listed there.

THE COURT: All right. Arkansas?

MR. SELLERS: None.

THE COURT: All right. Middle District of Georgia?

MR. SELLERS: The Mitchell case, Your Honor.

THE COURT: Okay. Indiana case?

MR. SELLERS: The Joiner case has had formal discovery.

THE COURT: All right. Kentucky case?

MR. SELLERS: Yes. The Garrett case has had formal discovery.

THE COURT: And Maryland?

MR. SELLERS: Yes. The White case has had

formal discovery.

THE COURT: And then out of the Mississippi cases?

MR. SELLERS: The Brown case has had formal discovery, Your Honor.

THE COURT: Any other Mississippi cases?

MR. SELLERS: No.

THE COURT: Missouri case?

MR. SELLERS: No -- oh, I'm sorry. Yes. Woodward.

THE COURT: Oklahoma case?

MR. SELLERS: No.

THE COURT: And the Texas case?

MR. SELLERS: And yes, the Earle case has had formal discovery.

THE COURT: Okay. The rest of the cases there's been no discovery whatsoever.

MR. SELLERS: No formal discovery, yes, Your Honor.

THE COURT: Okay. All right.

First, before we get into the meat of the scheduling order, as I indicated in my text-only order, I am going to require that a joint proposed scheduling discovery order be submitted by the parties by November 27. That's 14 days from today. Hopefully, today we

will resolve the most substantial disagreements by the parties, and I'll give you the indication as to what should be included.

If we conclude with me saying y'all see if y'all can work that out on an issue and you're unable to work it out, then what I want included in the scheduling order is a short statement of the plaintiffs' position and then a short statement of the defendant's position, because what I'll do is, I'll go into the order -- I'm going to get you to -- you need to e-mail the order to Ms. Elizabeth Long. Her e-mail address is included in that first order. She's going to be the clerk handling the filings in this case.

Send it to her in WordPerfect format so that I can revise it easily. If you e-mail it to her in that format, there won't be any need to send a disk or anything. And what I'll do is, if there's sections where there are disagreements, you'll have your position stated, then the defendant's position stated, and then I'm just going to go in and insert "The Court adopts the plaintiff's position" or "The Court adopts the defendant's position" or "The Court adopts the following modified position." So include it all there in the order so that can be done fairly easily.

With regard to appointment of liaison counsel:

Now, there's reference here to lead counsel, liaison counsel, steering committee. Tell me from the plaintiffs' perspective why that should matter to me, the different roles that those people are playing. I mean, it seems to me that my concern should be appointing liaison counsel that is going to have the court-ordered responsibility to make sure everybody stays informed.

But, Mr. Sellers, from your perspective -- didn't you indicate that there's lead counsel and then there's liaison counsel and then steering committee? Is there any need for me to give any court-ordered expectations to anybody other than liaison counsel?

MR. SELLERS: Your Honor, we think there's some value to that structure. It ought to facilitate the orderly coordination of proceedings before the Court.

THE COURT: What's lead counsel going to do vis-a-vis defense counsel, as compared to what liaison counsel is going to do? I mean, I just want -- I don't have a problem with it. I just want to make sure it's clear between the parties as to who is who and who has what responsibilities to each other, so that it doesn't -- we don't complicate it, so that one person doesn't -- the defendant Mr. Mueller doesn't know -- he needs to know whether he's got to contact you or liaison

counsel or who.

MR. SELLERS: Thank you, Your Honor.

I would -- it's my notion that the liaison counsel would serve as the primary liaison with the Court. I would expect that for the most part I might be -- expect to be the person delivering oral argument in matters that are common to all these cases before the Court. But if the Court has questions about scheduling or ensuring that somebody has copies of all the pleadings or things of that sort, I would -- my notion was, liaison counsel would --

THE COURT: All right. So liaison counsel will be our contact, the Court's contact.

MR. SELLERS: That's my expectation.

THE COURT: Is that the way you see it, Mr. Mueller?

MR. MUELLER: Yes, sir.

THE COURT: All right. And you want -- who is it that the plaintiffs are suggesting be liaison counsel?

MR. SELLERS: Mr. Maniklal.

MR. MANIKLAL: I'll be the liaison counsel, Your Honor.

THE COURT: All right.

MR. MANIKLAL: And I'm based out of Atlanta, a

Georgia lawyer, admitted in the middle district.

THE COURT: Okay. All right.

And as far as communication between the plaintiffs and the defendants, scheduling that type of thing, who's going to handle that? You will.

MR. SELLERS: Your Honor, my expectation is that I would and in my absence Ms. Webber would, but our office would do that. We would coordinate matters with the defense. We would also try to coordinate matters amongst the plaintiffs' counsel for all these cases to facilitate the orderly conduct of discovery, to minimize the need for multiple filings on particular matters, things of that sort.

THE COURT: All right. Mr. Mueller, do you see the same way the role of liaison counsel and lead counsel?

MR. MUELLER: Yes, sir. Mr. Sellers and I and Ms. Webber have had a relationship that has worked exactly as Mr. Sellers just described it for nine years -- eight-and-a-half years. It's worked well. In this instance now, Ms. Schreter would be joining and playing a liaison role for our side. But in terms of that lead counsel relationship, I think that would be a good relationship.

THE COURT: All right. Well, then, it sounds

like there's going to be no disagreement on that part of the scheduling order, if y'all will just include in the scheduling order the appointment of the liaison and the lead counsel and just make it clear -- concise but clear -- the role that each will play, and that should take care of that.

Now, of course, in the past, when we did not have electronic filing, the liaison counsel played a huge role in making sure that everybody got copies of everything. Is it the expectation of the parties that you're going to limit service to liaison counsel or serve everyone?

What would be your position with regard to that, Mr. Sellers?

MR. SELLERS: Your Honor, our expectation is to the extent possible we will file everything electronically and, I assume, pursuant to the electronic filing system. Every counsel who has registered with that system will automatically get service of those matters.

THE COURT: Right.

MR. SELLERS: There may be some counsel -- as yet I don't know who they would be, if any -- who might not register or cannot register through that system. And we would ensure -- I would hope that liaison counsel

under those circumstances would ensure that those such people, such lawyers, would receive service as well.

THE COURT: Well, is that your understanding of how this would proceed under the electronic filing, Mr. Mueller, is everybody is going to get served that's electronically registered?

MR. MUELLER: That should do it, Your Honor. We're set up for ECF.

THE COURT: All right.

MR. MUELLER: I assume everybody who wants to be in the plaintiffs' group is set up for that.

The only issue that comes up from time to time is certain confidential filings. I have to study better what the Court's rules are going to be for confidential filings in this matter, but typically we've given a disk to Ms. Webber. If that means I now have to send a disk to Atlanta, I'll do that. But other than that --

THE COURT: Our system is set up such that -- of course, you can have the typical filings where anything that's filed is served on everybody and it's a matter of public record. Then you can file things under seal on our system, such that it goes into our system and it may show this was filed under seal and the public does not have access to it, but all of the registered attorneys on the case can go in and have access to it.

And then we've got a more restrictive access, which I think we label ex parte. I'm not sure how our labels go. I'm sure this is no different than any other federal court that's on this system. But we've got a system situation where it can be filed such that only the judge sees it. And that would be something -- for example, if there was something needed to be reviewed in camera by the judge only, then the filing party, I think, can make that designation and nobody else would see it. So I think our system takes care of all of those things.

Now, before you can file anything under seal, you've got to first get permission from the Court to do that, and we'll get a short order allowing that to happen. So I don't think that's going to be a problem. I think that will work.

Now, it seems to me that with liaison counsel there is no need -- and with our mandatory CM/ECF requirements -- it seems to me that there is no need for us to serve any of our orders by mail on these non -- on these attorneys who have not signed up for CM/ECF. So put in the scheduling order that the Court's orders will only go to attorneys who are signed up for CM/ECF. And any other attorneys of record who are not so signed up, the liaison counsel shall have the obligation of mailing

copies of those orders to those persons; and that would provide you with some incentive to get them signed up, if you don't want to have to -- of course, this is a bigger problem for the plaintiff than the defendant. I mean, we've only got one defendant. So you don't really have a problem.

But I think there are about 20 of your brethren that have not signed up for CM/ECF. So that's going to be -- anything we send out of here, you're going to have to mail copies of it to them -- well, I guess you'll have to serve them.

And I really think the defendant should be excused from having to serve by mail any attorneys who are not signed up through CM/ECF, and that their burden of service will be satisfied upon making sure that liaison counsel is served electronically. And that way everything by all of the parties will be done electronically, with the liaison counsel picking up those that don't sign up.

Now, they can -- seems to me you can either get them all to sign up or you can encourage them to withdraw in some way or, if you want to serve them by mail, go ahead.

But I think, Ms. Schreter -- is it Schreter or Schroeder?

MS. SCHRETER: It's Schreter, Your Honor.

THE COURT: Schreter? Make sure there's a provision included in the scheduling order that's going to be filed in 14 days that indicates that your service obligation is just upon those who have registered electronically and that liaison counsel will serve the nonregistrants by mail. I want to make sure that's set out in there so there's no confusion later on.

But the clerk's office will not be sending -- for example, on Thursday, whenever it was I sent out that text -- or Friday maybe -- text-only order, we had to photocopy that and mail it to 20 people. And we're just not going to do that.

Okay.

MR. MANIKLAL: Judge, is it -- would it be acceptable in the order to say that for those that are not registered that liaison counsel can serve them by mail or, if we have electronic mail address --

THE COURT: Sure.

MR. MANIKLAL: -- we can do it that way also?

THE COURT: What I think the order needs to say is service upon the CM/ECF participants and liaison counsel is good service on everybody in this case, and that liaison counsel will have the duty to make sure the nonregistrants are properly notified of each filing.

I mean, that's the way it worked before, wasn't it, is that the Court would just serve liaison counsel with the orders and that would be good -- or you would just serve fellow liaison counsel, that would be good service, but they had a duty under the Court's order to keep everybody notified.

Okay. Regarding the scheduling order and the sequencing of discovery, seems to me that obviously the biggest issue that needs to be resolved is how we sequence the certification slash notice part of the case in relation to the summary judgment motions that are going to be filed in the union cases under 203(o). The defendant thinks that we should proceed with the 203(o) issue first to narrow the issues. The concern expressed by plaintiffs, which I think -- I mean is a legitimate one -- is that the Court needs to minimize delay so as to make sure that the rights of potential opt-ins to opt in in a timely manner before the statute of limitations expires is preserved.

So that seems to be what needs to be balanced, is the legitimate goal of deciding the 203(o) issue, I think, to -- if it doesn't eliminate cases, it possibly could in some cases narrow issues -- decide that in a prompt manner, while at the same time preserving the rights of the potential opt-ins not to be barred under

the statute of limitations, due to no real fault of their own but due to the Court's delay in getting to those issues because it may have a scheduling order that puts them farther down the road than they should be. It seems to me pretty clear that the intent of the collective action aspect of the -- these cases is to at least decide fairly close to the beginning of the litigation whether the action ought to at least conditionally be certified so that notices can go out and then give the defendant the opportunity to -- after more substantial discovery -- to de-certify the class.

Well, let me ask this first. I mean, that's the two-stage process basically in the Eleventh Circuit. Is that -- is the Eleventh Circuit unique in that regard? I mean, it seems that the approach is you take a look at the pleadings primarily and maybe affidavits and you make a preliminary decision on certification so that you can decide whether notification ought to go out, and then that's done promptly in a scaled-back version -- with a scaled-back version of discovery, subject to the defendants then being able to engage in discovery that would go toward having it de-certified.

Is that the common practice in all of these circuits where these cases come from, Mr. Sellers?

MR. SELLERS: Yes, it is, Your Honor. I might -- if I might just add one thing. I think it is fairly common that the courts expect to rule on the initial request for certification and notice, initial certification and notice, on the basis of the well-pled allegations and sworn statements. And a number of courts have concluded that it was not necessary to proceed with discovery at that juncture, because there's no need to resolve or expectation to resolve dispute --

THE COURT: But do the other circuits -- I forget the Eleventh Circuit case, may have been the Hipp case. One of the Eleventh Circuit cases that said, fairly expressly, that there should be this two-step process --

MR. SELLERS: Yes.

THE COURT: -- with regard -- do the other circuits say that, or not?

MR. SELLERS: Well, they do. Not every circuit has had occasion to address it; but where they have, they do all embrace the same approach. And the district courts in the jurisdictions from which these --

THE COURT: I mean, there's not a -- in your view, there's not a circuit conflict on that issue.

MR. SELLERS: That's --

THE COURT: It's either not been addressed or

other circuits have addressed it similar to the Eleventh Circuit?

MR. SELLERS: That's correct.

THE COURT: Do you agree with that, Mr. Schroeder?

MR. MUELLER: Mr. Mueller.

THE COURT: I mean Mr. Mueller. I'm sorry. Ms. Schreter.

MR. MUELLER: I do, but I'd like to add this caveat. I agree with Mr. Sellers, it's not been addressed in all the circuits. We also would like to file a brief soon addressing whether the law --

THE COURT: Let me ask you this: Do you see -- do you have any objection -- I'm not saying what we're going to do, whether we're going to adopt your position yet on this 203(o) issue or not. But when we address the certification issue, do you have any objection to that framework in the -- using the Eleventh Circuit framework, that it's really contemplated to be a two-step process: one, a -- I won't call it no discovery, but a minimal discovery review of conditional certification. And then if you certify, you have additional discovery, and the defendant will have the opportunity to seek de-certification.

Do you have any objection to that analytical

framework -- which is not something I'm making up, but it's the Eleventh Circuit. I guess I'm asking do you have any objection to that being used in all of these cases, even though they come from different circuits.

MR. MUELLER: Your Honor, we would not have an objection to that if that were the posture of this case. I mean, that is certainly what Hipp says.

The Court needs to be aware of the fact that seven of these plaintiffs, when they were in the Northern District of Alabama, conceded that the first step review doesn't apply here. And that's because they had years of discovery already, and Judge Hopkins noted this in her order.

THE COURT: All right. Well, we can address that. I mean, I'm not suggesting -- it seems to me that when they file their motion for certification, then you can -- you can oppose it. And I would think that -- I don't see a problem with you, in those cases where there's already been discovery, using whatever has already been filed. In other words, if you've got discovery in a case that conflicts with the well-pled allegations of the complaint, then I don't know why at that initial stage in that particular case you wouldn't be precluded from pointing that out to the Court. What I'm thinking is, is deciding that initial certification

issue without significant additional discovery. But I don't think I would preclude you from using whatever has been filed up to -- up to now to oppose it.

MR. MUELLER: May I respond?

THE COURT: Yes, sir.

MR. MUELLER: In the two motions they have already filed, which is in the Dobbins case and in the Mitchell case, they're already making use of this discovery in support of their motion. And from our perspective it's unfair for them to take discovery that covers the period '96 to March of 2001 and ask the Court in 2007 -- or maybe 2008 -- to certify the classes without a little bit of updating in the discovery. And that's why we've proposed --

THE COURT: All right.

MR. MUELLER: -- some additional discovery, because it's -- they want the best of both worlds. They want to take the discovery and try and use it to get a certification six and a half years after discovery. We can't talk to their clients. We can only depose them. And that's --

THE COURT: All right. Well --

MR. MUELLER: -- a little unfair to us.

MR. CAMP: Your Honor --

THE COURT: Yes, sir.

MR. CAMP: -- if I may, I'm Robert Camp. I'm counsel on the Dobbins case that Mr. Mueller referenced. And I filed the notice motion, and we did not rely on any previous discovery from the Fox case when filing that. We simply filed our motion based off of our pleadings and affidavits. We did not include any additional --

THE COURT: All right. Is that likely going to be what -- how you're going to proceed in all of these cases, Mr. Sellers, is you're just going to rely on the well-pled complaint?

MR. SELLERS: Your Honor, we plan to rely on the well-pled allegations and some sworn statements but not from formal discovery.

THE COURT: You're not going to be citing depositions or whatever from previous cases?

Well, just know that if you are, then I'm likely going to give the other side a chance to do some limited discovery to combat that.

MR. SELLERS: That's fair enough, Your Honor.

THE COURT: All right. Let's not get into that just yet. I mean, now -- getting back to the issue of how to balance the interests of addressing the 203(o) issue in a prompt and efficient manner, while also preserving the rights of these potential opt-in

plaintiffs not to lose the claim based on the expiration of the statute of limitations while the Court's considering the 203(o) issue.

I mean. It seems to me that -- Mr. Mueller, if you want to avoid -- if the defendants want to avoid -- or if the defendants want the 203(o) issue decided first, then it seems to me that the only way to really preserve the rights of these plaintiffs not to lose their claims based on the statute of limitations expiring would be for the defendants to agree that the statute of limitations shall be tolled during the time that the 203(o) motions are being considered.

Do you know of any reason why they couldn't agree in all these cases to toll the statute of limitations, if they agreed to do so? Mr. Mueller?

MR. MUELLER: Well, Your Honor, I would want to check with my client before I agree to tolling, but I would --

THE COURT: I'm not asking you to agree right now. I'm just giving you the option -- basically what I'm telling you is I'm not going to decide 203(o) first unless you can provide me with a way to preserve the claims that may be lost while the Court is considering that issue due to the expiration of the statute of limitations.

MR. MUELLER: Well, that makes it easy. Then we'll --

THE COURT: You can present that to your client. If you want to get that 203(o) issue decided up front -- which I think there's great merit to doing that, because I think it would -- it could. I haven't decided it. Obviously, I've read Anderson. But it could narrow the issues in some of the cases and make the work more efficient in the certification issue by deciding that first. But I'm not going to decide it first if it runs the risk of causing potential plaintiffs, opt-in plaintiffs, to lose their claim because of the expiration.

So my -- I mean, you may have other suggestions. It seems to me that one thing, the defendant could agree to toll the statute for that limited period. And the other, which I think is probably -- may be less enticing to you, but you could agree without any prejudice to conditional certification and notice and subject to de-certifying. And then we eliminate that first hurdle altogether, but you would not be eliminating your opportunity to oppose certification.

So if you would agree to conditional certification without any prejudice, so that you could

contest it later, then that would handle the notice issue. We'd get the notices out. And then we'd move straight to your 203(o) issue. And then we'd have a discovery schedule for you to do discovery to fight certification, as well as the other issues.

So there may be some other way to do it, but I'm not going to address 203(o) up front without some protection for the potential opt-in plaintiffs.

MR. MUELLER: May I just make --

THE COURT: Yes, sir.

MR. MUELLER: -- an observation?

If that's the Court's ruling, then obviously that's what we'll do. I was going to make the point that we're prepared to brief this very quickly. And even under their proposed schedule, the 3(o) motion would be --

THE COURT: 203(o)?

MR. MUELLER: Yeah. The issue would be fully teed up before they even file their class briefs. They want 60 days to file the class briefs. We can have this 3(o) motion totally teed up before then, and there wouldn't be any prejudice to anyone.

THE COURT: Well, what you sometimes don't appreciate is that this is not my only case. So while it may be teed up, I may be playing another course and

not be able to get around to swinging at it for -- I mean, you know, I've got other cases. And the most efficient operation in the world, I think, takes a minimum of 60 days to decide what could be potentially dispositive motions. So once it gets to me, there's going to be some additional time where I've got to consider it and draft an opinion and that type thing. So...

Yes, sir, Mr. Mueller.

MR. SELLERS: I'm sorry --

THE COURT: I'm sorry. Mr. Sellers.

MR. SELLERS: Yeah. Your Honor, I would like to remind the Court -- is perhaps already aware -- that even under the Cagle's decision, the disposition of the 203(o) defense also involves factual determinations and therefore will necessitate --

THE COURT: Right.

MR. SELLERS: -- some discovery in connection.

THE COURT: I understand. My impression -- well, I mean, I suppose there could be cases where the donning and doffing is covered expressly in a collective bargaining agreement. Are there no cases like that? Is it all -- whether it's a custom and practice, so there are no easy cases.

MR. MUELLER: The latter.

THE COURT: All right. So there would have to be some discovery as to whether excluding that time is a custom and practice in that plant?

MR. SELLERS: Your Honor, certainly there would need to be some discovery with respect to whether whatever has happened with -- in the bargaining history constitutes a customer practice.

But if I may, the Cagle's case did not reach the decision with respect to unique equipment -- what was described as unique equipment by the district court -- whether that qualified as clothes changing, because in that -- in the case there, the work performed in donning and doffing unique equipment was fully compensated. So there may be some question about factually what would qualify as unique versus non-unique equipment in the chicken-processing industry. That's an initial matter.

Then the second question, obviously, is if the Court were to conclude that the -- that this were clothes changing that satisfied the standard for Rule -- Section 203(o), we have the customer practice question, for which we've had no discovery --

THE COURT: All right.

MR. SELLERS: -- on these plants.

And then the third question -- I'm sorry, Your

Honor. Just the third question that would ensue is, even if the Court were to rule on -- conclude that all of that ought to be -- those claims -- the donning and doffing at the outset and at the end of the shift should be -- claims to that time should be dismissed, there's still the question of whether, as was the case in the Fox rulings before Judge Hopkins, that there may very well be sufficient time remaining that it won't dismiss the entirety of those claims anyway. And that's --

THE COURT: But if you -- I'm not saying this is what the ruling would be. But if you've got the donning and doffing out of the cases, if that ended up being the ruling -- which I'm not saying that it is -- then it certainly narrows down what you're going to be arguing about as far as whether people are similarly situated.

MR. SELLERS: Well, Your Honor --

THE COURT: If you don't get it knocked out, you're going to say these people are similar because they all would come in and put on the rubber boots or whatever it is and the outer clothes and the hair net or whatever it may be; whereas, if that's considered to be clothing and not covered under 203(o), all that's -- you're not going to have to argue about it, and the Court's not going to have to consider it -- then I may

would just focus on, well, are there some of them that wear a mask or -- I mean, whatever -- I don't know what this protective equipment you're talking about would be, but it would certainly --

It seems to me that the most efficient way to handle it is to be able to address that issue up front in the unionized cases, while at the same time preserving your statute of limitations issue, and to construct a scheduling order that provides for limited discovery on the 203(o) issue. I mean, do you --

Yes, sir.

MR. SELLERS: Your Honor, I defer to the Court's -- if this is the Court's ruling, we obviously will abide by it. I just want to be clear that even if the Court were to conclude eventually that the donning and doffing activity at the beginning and the end of a shift --

THE COURT: You may still have an FLSA claim in those unionized plants.

MR. SELLERS. Yes, but I -- I'm sorry. I'm making an additional point, which is there is donning and doffing in the middle of the shift that would still -- would not be the subject of any dismissal because it's not post or preliminary.

THE COURT: Well, again, if we've taken out the

beginning and end of the shift, then the motion that I'm going to have to be considering is going to be narrowed as to whether there are similarly situated persons in the middle of the shift. I mean, there -- however you want to spin it, it would narrow the issues.

I mean, I don't know -- it may be that everybody does exactly the same thing at the beginning, at the middle, and at the end. That's probably going to be your argument. And if that's so, then they're probably going to be similarly situated. But I could see a situation where they all do exactly the same thing at the beginning, at the end, but they may not at midday. And if I only have to decide whether they all do the same thing at midday, it's just going to make it more efficient to decide it.

But the first thing that would need to be determined is whether Tyson, in order to get that issue decided up front, is going to be willing to enter into some tolling agreement on the statute of limitations or agree to some type of conditional certification. And you just don't know the answer to that today, I would assume, Mr. Mueller?

MR. MUELLER: We can let the Court know either -- certainly by tomorrow. I would just have to consult with my client.

THE COURT: All right. Well, if your client -- if your client -- let's do this, because I don't really want you to come back to me except with this final proposed scheduling order.

So let's first of all travel down the road that your client is not willing to consent to it, that they think there's some ghost in the bush that's going to come out and get them later on if they consent to something. So let's assume that they're not going to consent to it, first of all. And what I'm understand -- which would mean that we would proceed on the scheduling order with the initial certification decision to be decided first.

And as I'm understanding you, Mr. Sellers, you don't expect that decision to require any discovery.

MR. SELLERS: Your Honor, I don't expect to require any new discovery. And as I understood the Court's position a moment ago, in the event as to any of these plants for which we seek certification, we rely on any information collected in formal discovery undertaken in the Fox case, we certainly recognize that Tyson would have -- should have the opportunity then to conduct some limited discovery in response to it.

THE COURT: All right. Well, then, if -- does everybody agree that --

Well, do you agree, Mr. Sellers, that the legal standard for certification and notice is the same in all of the circuits where these cases are pending?

MR. SELLERS: Yes, Your Honor.

THE COURT: I mean, this is not a classic class action. I'm going to have to decide certification and, quite frankly, Rule 203(o) issues based on the law of the circuit for each case and where they're coming from.

Do you agree with that?

MR. SELLERS: I think in general that's correct.

THE COURT: All right.

MR. SELLERS: But I --

THE COURT: Do you anticipate any difference between the cases, based upon the circuit they're coming from, with regard to the certification notice standard?

MR. SELLERS: No, Your Honor.

THE COURT: Do you anticipate any difference, Mr. Mueller?

MR. MUELLER: Your Honor, I do not. I can't represent that I know the standard in every one of these circuits, but we're going to file a brief with the Court's leave, as is typical in an MDL case, arguing that Eleventh Circuit law applies and -- especially

since this is a procedural matter -- and that it's the Eleventh Circuit's standard that governs here on this issue. That would just take care of the issue of whether there even are any --

THE COURT: Is that the law with regard -- the substantive law -- I don't think that's the law with regard to the substantive law in an MDL case unless the parties agree, is it?

MR. MUELLER: I believe that the MDL courts, transferee courts, have generally -- and I mean very heavily -- agreed to the law -- apply the law of the circuit of the transferee court. And I believe that's true of both procedural and substantive matters, but --

THE COURT: Well, I can see that being the case if there's no indication that the other circuits have any contrary position. But for example, if on 203 -- the 203(o) issue, if there is another circuit where these cases were pending before they came here, that took the exact opposite position -- say there's a direct conflict between the Fifth and the Eleventh Circuit -- then it would be your position that I would apply the Eleventh Circuit standard -- it's not procedural, substantive -- Eleventh Circuit standard to the Fifth Circuit cases? That can't be the law, can it?

MR. MUELLER: I don't think there are any

direct conflicts --

THE COURT: All right.

MR. MUELLER: -- between the circuits at this point, but I would like to brief it --

THE COURT: I'm going to let you brief it, but --

MR. MUELLER: There's some nuances certainly, and we'd like to address that point.

THE COURT: I mean, I could see following the Eleventh Circuit law if there's no indication in the other circuits of any conflict, which that may be the case. There may be no other circuit that's spoken to the 203(o) issue. I mean, that's just the only issue that really pops out at me. I'm sure there are others.

Okay. With regard to the certification, what did -- what did the plaintiffs suggest as to the timing of filing those motions?

MR. SELLERS: Your Honor, our proposal is that we would file those motions roughly within 60 days of today's date on a rolling basis, in order to permit some kind of sequencing of the adjudication of those issues, but on a rapid rolling basis so it doesn't --

THE COURT: And then the defendants would have how long to respond?

MR. SELLERS: They would have 40 days to

respond, and then there would be a 20-day period for a reply.

THE COURT: All right. Assuming that we proceed with the notice certification issue first, Mr. Mueller, does that schedule sound reasonable to you?

MR. MUELLER: Well, we have a different view of how it ought to proceed. If he wants to file them on a rolling basis or a rapid rolling basis, I guess that's fine.

THE COURT: Well, what I want to decide today is any disagreements between the two of you so that when you -- whoever is going to draft the scheduling order -- y'all are not fighting back and forth, you're just basically putting down what I've decided.

So what --

MR. MUELLER: We would like to --

THE COURT: This is under the assumption that you're not going to agree to conditional certification and that you're not going to agree to tolling, and we're going to therefore proceed with notice certification first.

What is your proposal?

MR. MUELLER: We would like some discovery first. That's our proposal. Not 40 days after they

just filed these, but that we have an opportunity to conduct the limited discovery that I think Mr. Sellers said he agrees we're entitled to.

THE COURT: You want to conduct the discovery in the cases where they intend to rely upon something other than the well-pled complaint.

MR. MUELLER: We would like that discovery whether or not they cite that. The point is, they have the discovery. Whether they choose to cite it in their brief, I don't think, is the important point under Hipp. The point is, the discovery has been had, and we've agreed among ourselves that all the discovery is usable in this case.

THE COURT: But it exists. So if you want to use it to oppose it -- oppose this motion for certification, then you can use it. I'm not -- nothing would prohibit that. If they want to use it, and you think that in order for it to be balanced you need some limited discovery in those cases where there is discovery that they want to use, then I would not have a problem permitting that. But if there is just discovery out there, already done, that they don't intend to use, why would you need additional discovery to combat something that they don't intend to use, when -- if you think it's in your favor -- you can use it already?

MR. MUELLER: Well, because, first of all, Hipp says if the discovery is out there, you apply a little bit more stringent standard. It's not a question of whether they use it. It's a question of whether the discovery has been had.

And second, I think in the Mitchell case we've already seen their motion, and they're relying on some new declaration evidence to try and --

THE COURT: Well, let's take the first issue first. If Hipp says if it's out there, there's a little more stringent standard, then that can be your response, that there is a more stringent standard here, there is this discovery, here it is, and this is why you shouldn't certify it. And they will run that risk of the Court deciding that's what Hipp says.

What's the second problem?

MR. MUELLER: The second -- I wouldn't say it's a problem. But evidentiarily they have attached at least one new declaration -- I don't know how many -- to their Mitchell motion. And they're trying to fill the gap in the years since the discovery was taken as well. We obviously don't have a right to talk to that person, and I don't know how else he's going to support his motions that are coming up. But our point would be that we would like to respond to that with some limited

discovery.

THE COURT: How do you read the Hipp bifurcated -- not bifurcated but the Hipp two-step -- I mean, if you're going to allow all this discovery on the first step, why do you even have the second step?

MR. MUELLER: Well, that's an interesting question. The Fox case proceeded, I think, before Hipp came out. I think it came out in the middle of the case. And you can't undo that. I mean, you can't put the toothpaste back in the tube here. We have a lot of discovery. We've all agreed among ourselves all that discovery is usable in this case. It wasn't just at the eight plants. It was also at corporate. And you have to take that into account. There's been a lot of discovery here.

THE COURT: Well, the court that allowed all that discovery didn't go along -- didn't go for the Hipp two-step.

MR. MUELLER: Hipp was unknown at the time, but that's correct. The Court just allowed the discovery to go forward while the class motion was pending. And there was substantial discovery before it was first argued, and all discovery was done by the time it was actually decided.

THE COURT: Yes, sir.

MR. SELLERS: Your Honor, may I speak to a couple of things?

First of all, in the Fox case, I think it's important for the Court to recognize the discovery in that case ended in 2001. So it did not extend back -- there's been no discovery whatsoever, by either side, of any events that occurred over the last three years, which would presumably be the focus of most of the discovery at this juncture because that's the period that's covered by the statute of limitations under the Fair Labor Standards Act.

THE COURT: Let me ask you this: Who has the -- I'm presuming that it's the plaintiffs' burden to bear the cost of notification preliminarily. Is that correct?

MR. SELLERS: That's correct.

THE COURT: So what is the burden on defendant of deciding the certification issue initially, based on no discovery, and then if the Court concludes based on the well-pled complaint that it should be certified -- and then the plaintiffs have the burden of notifying all these people of their opt-in rights, knowing that all that could be for naught if the Court later de-certifies -- then what is the burden from the defendant's perspective of having the matter decided

based on limited or no discovery in that first step other than just putting them through as many hoops as you can put them through?

MR. MUELLER: If I understand the question right --

THE COURT: There's going to be no expense to you in notification; correct? If the Court certifies and says notify, then that's no expense to you.

MR. MUELLER: Not really. We have to come up with the names and addresses.

THE COURT: Okay.

MR. MUELLER: And they're asking for names and addresses going back to 1996. This is not as easy as it sounds, but --

THE COURT: All right. It's not significant.

MR. MUELLER: It's not an insignificant burden on us to go through the process.

THE COURT: Okay.

MR. MUELLER: And I think that's -- if that's Your Honor's only question.

THE COURT: Well, I'm just trying to see how your rights are prejudiced by deciding the initial certification decision on no discovery.

I could see how they would be prejudiced if it were your burden solely to notify everybody and go

through that expense. That may be for naught if discovery later indicates it should not have been conditionally certified. But I'm really seeing how you are significantly prejudiced --

MR. MUELLER: Well, from --

THE COURT: -- because -- I mean, you say that it may cost you something to look at the addresses, but you're saving the cost of having to do the initial discovery. I don't know how all that is going to offset. I guess you can use that same discovery later on.

But it seems clear to me that the framework, at least envisioned by Hipp, is that we're not going to fight certification full bore twice. We're going to fight it in phases. In one the Court's going to do an initial review of the well-pled complaints to determine whether there are sufficient allegations and the record is sufficient to determine whether it should go to the next step, and that is be conditionally certified so that people can be notified of their opt-in right. And then you're going to be able to do this discovery and then file a motion to de-certify it, if you're able to pierce the allegations in their complaint and show that that's not the facts, that's not a fact, that -- and therefore, the Court should de-certify.

But it seems like you're taking this hybrid position: Well, we ought to do some discovery in the first phase and then full-fledged discovery in the second phase. And what I'm trying to understand is how do you draw the line, how do you keep them from not both becoming full-fledged discovery-based decisions.

MR. MUELLER: Well, Your Honor, as I understand it, there's two questions: First, why we take the position in the case --

THE COURT: The one question is, why do you need discovery in the first phase.

Let me make it even simpler.

MR. MUELLER: Yes, sir.

THE COURT: Let's assume that this is just a FLSA case that has been filed -- just filed, it's one of these cases where there was no previous discovery. Let's take out the Fox cases. We'll pick one of the other ones.

In that case, where there's been no previous discovery, why do you need discovery in those cases on the initial issue of conditional certification?

MR. MUELLER: If that is all we were talking about, we probably wouldn't, except that that's not the animal that we have here. We have a case that's got years of discovery and already a ruling on intraplant

and interplant differences.

THE COURT: But just for those plants; correct?

MR. MUELLER: Well, she was ruling on a case that encompassed all these plants. They only had limited discovery.

THE COURT: All plants in all 18 cases?

MR. MUELLER: Yes, every one of our plants in the country. That was part of the class that they wanted certified. It wasn't just eight plants. They got plenary discovery from those eight plants, but the case wasn't about just eight plants. It was about all the plants that are in this case, and that's what makes this different --

THE COURT: Well, I haven't read her order, but my understanding of the order was that she concluded that there couldn't be a nationwide collective action; that from plant to plant it was insufficient to -- it was either unmanageable or they couldn't carry their burden of showing that the practices in every plant in the country were sufficiently similar.

MR. MUELLER: I agree with that. That is --

THE COURT: But that's not what I have. What I have is whether in most of the cases, except for the Arkansas case -- what I've got is whether the plant in

Buena Vista, Georgia -- whether all of those employees, when they are on the chicken line or whatever you want to call it -- whether they all are subject to the same policy with regard to pay for their donning and doffing and their cleaning and everything else.

Now, certainly her order on these other plants, that there were not sufficient similarities nationwide, is going to have no binding effect on my decision with regard to that Buena Vista plant. Maybe you think it will, but I don't think it would.

MR. MUELLER: I don't see it as binding. In fact, she does note intraplant differences, so she -- and she's not talking about Buena Vista in her order, but she is talking about eight of the plants.

THE COURT: All right. Well, let's take the Buena Vista case. Is there any discovery needed in that case, for the Court to decide the initial conditional certification?

MR. MUELLER: We would like the discovery. Can I cite you a case that says --

THE COURT: Yes, sir.

MR. MUELLER: -- absolutely entitled to it? No, sir.

THE COURT: Okay.

MR. MUELLER: The Hipp case talks about what

usually happens. It's not a definitive rule. And our point is just --

THE COURT: I'm going to follow the Hipp rule. So unless you can convince me that -- well, to me, the rule should be the Hipp rule, which is -- I would think, unless there's some extremely unusual circumstance, the initial certification decision will be decided based upon the well-pled allegations in the complaint.

Now, if the plaintiffs seek to rely upon anything beyond -- I mean, they're going to refile these motions. And if they seek to rely upon anything beyond the well-pled allegations of the complaint or the affidavits of the individual employees, then you'll have the right to file a -- either reach agreement with the plaintiffs to do some limited discovery or, if they don't agree, file a motion with the Court to do some limited discovery. But if they don't rely on anything other than the well-pled complaint in these additional employee affidavits, then I don't see where there's need for discovery at this first phase. You'll be able to do full discovery in your -- if you decide to file a motion to de-certify.

So if there's no discovery, does the defendant think they've got sufficient time to respond under the plaintiffs' proposed schedule, which you'll have 30

days -- or 40 -- you gave him 40?

MR. SELLERS: 40.

THE COURT: -- 40 days from the date that any motion to certify is filed to file your response. Does that seem adequate?

MR. MUELLER: I would --

THE COURT: If there's no discovery?

MR. MUELLER: Well, as I understand it, we have a right to use the discovery still to respond.

THE COURT: You do.

MR. MUELLER: And my only concern is -- with agreeing to that is we don't know what the rapid rolling basis is. I have no way of planning. It's totally within their control. And unless I know how they're staged, I don't want to agree to 40 days. I think that's self-evident. He may or may not elect to file them at the same time. He may put some of them closer than others. It's just hard for me to say as I stand here.

THE COURT: I mean, I say "only." But there are only going to be 18 of them; right?

MR. MANIKLAL: At this point, Judge, unless there's another case transferred in, but that's correct.

THE COURT: Well, I mean, this is not a situation where we're talking about 200 cases.

MR. MUELLER: That's correct. But the one case alone has 16 plants, and that one's a big motion. I think it's --

THE COURT: The Arkansas case has 16 plants?

MR. MUELLER: Yes, sir.

MR. SELLERS: Your Honor, we'd be happy to agree to stage it so that that one gets filed later, slightly later, not a long time later. But we deal -- with all the others, we would file them all by mid-January, and then we can set a separate schedule --

THE COURT: All right. Let's do this --

MR. SELLERS: -- for the Arkansas filing.

THE COURT: I think you've got enough of the flavor of how I want it addressed. I'm going to let y'all get together between now and when you've got to submit the order and see if y'all can't reach agreement as to how they're filed and the timing of it. And if you can't, put in the order this is what the plaintiffs' position is, this is what the defendant's, and I'll decide.

But I don't intend for that part of the order to be a brief. It's just your position. Not pages but sentence. I'm sure y'all can reach agreement as to how you would file them.

All right. Initial disclosures. Well, the

plaintiffs don't think that there should be any other discovery done until the Court makes its decision on initial certification.

Mr. Mueller or Ms. Schreter, do -- I mean, you're going to have your hands busy responding to all these motions; but do you also want, while the Court is considering these, to be doing merits-based discovery that may be necessary on, for example, the 203(o) issue, rather than just waiting until the certification decisions are made? I mean, you're going to have that defense whether it's certified or not.

I guess what I'm asking is, Do you want to do this in a pure -- they want to do it purely sequential, as I understand the plaintiffs' proposal, where we decide the class certification notice issues and then when that's decided we then move on to the rest of the discovery that would go, I presume, both to a potential motion to de-certify and a potential motion for summary judgment in the unionized plants on 203(o). I guess what I'm asking is, Do you want to have the opportunity to do some of that discovery in the first phase?

MR. MUELLER: You're going beyond initial disclosures; is that right?

THE COURT: Yes. Yeah, I'm going beyond initial disclosures. I mean, I'm going to get to that,

but --

MR. MUELLER: We are requesting the right for some discovery in an earlier phase, yes.

THE COURT: Yes, sir.

MR. SELLERS: Your Honor, I confess to being somewhat confused. I apologize.

I had understood that the Court's sentiment was that there would be -- unless we relied on some discovery that -- with respect to the notice motions, there would be no discovery relating to notice at that juncture.

THE COURT: What I said -- maybe I wasn't precise -- is that there would be no -- there would be no necessity of -- since you're not going to use discovery on the certification question initially, you would not need to delay filing the motions and responses regarding certification to wait -- you would not need to delay that filing because you're waiting on discovery. But what I'm asking is -- I mean, you can do two things at once -- whether there is some merit to not just putting discovery completely on hold until the certification issues are decided.

It wouldn't be used for that. So it's not a timing issue, that you've got to wait on the discovery before we decide certification. But it could be engaged

in so that when the certification issue is decided you're not starting from the starting gate.

MR. SELLERS: Your Honor, I must tell you, I think our concern is that under the plan we proposed and are prepared to live by, we're going to be very busy over the next 60 days putting together a number of motions for certification.

THE COURT: All right. Well, let's -- what about after all of those motions are submitted? In other words, it could take the Court 60, 90 days to decide the motions. I don't know how long. It may be longer. I'm not going to say. But that's going to be dead time --

MR. SELLERS: Right, that's -- I'm sorry, Your Honor. We would have no objection to --

THE COURT: You're starting discovery after the last reply brief is filed.

MR. SELLERS: That's correct, Your Honor.

THE COURT: I mean, as a practical matter, Mr. Mueller, you're probably not going to get focused on that until you're finished responding to all these certification motions anyway, are you?

MR. MUELLER: I could --

THE COURT: I'm not going to let you use it on the certification issue. So it's just a matter of, you

know, you wanting to get out of the block.

MR. MUELLER: Well, that's the first I've heard you say -- at least I didn't understand you to say we couldn't use it until just now. If that's the case --

THE COURT: No, no. You can use existing. I'm talking about new.

MR. MUELLER: If we can't use it, then there's no incentive to get started on it --

THE COURT: Right.

MR. MUELLER: -- for either. So that --

THE COURT: No. When I say can't use it, I mean on the initial phase. I mean you clearly are going to be able to do discovery in support of a motion to de-certify. I'm not -- I want to make that clear. I'm not limiting that in any way.

Well, then, let's try to draft the scheduling order so that it has this period for the certification motions to be decided relatively quickly, and then for the discovery period to begin after the last reply brief is filed on certification. That will be the beginning of the discovery period. And hopefully y'all can reach an agreement as to how that -- how long that discovery period shall last -- maybe we need to take it up now.

What do you think? What I'm -- what I don't want -- when I get this order back from you, I don't

want to have a lot of sections in it where it says plaintiffs' position, defendant's position. I want to get most of that knocked out today.

So we're going to start the discovery period on the day that the last reply brief regarding certification is filed. How long do you think that discovery period should last?

MR. SELLERS: Your Honor, I think overall we think we can complete the discovery within a year. For some plants, it will undoubtedly be shorter, where most of the -- some discovery may have already been undertaken, and others may take --

THE COURT: I think we should probably phase the discovery. I think we should have a short period where we -- you do the unionized plant discovery -- well, of course, that would be inefficient. It's not going to be efficient for you to go do just discovery on 203(o). I mean, if you're going to go do it, you're going to do it all at one time.

MR. SELLERS: Right. We certainly --

THE COURT: What would be your suggest -- I mean, what I would want to happen is to -- I wouldn't want to put a one-year discovery period and then that mean that the 203(o) issue is not decided until the end of that year. I mean, it would seem like you could -- I

don't know if you would just do the discovery in the unionized plants, but that's most of the cases, isn't it?

MR. SELLERS: Less than half, Your Honor.

MR. MUELLER: Well, it's 15 of 33 plants.

MR. SELLERS: It's less than half.

THE COURT: Okay. What's your proposal as to -- assuming we start the discovery period the day that the last reply brief on certification is filed, would the defendants prefer that to be just going to take a year for discovery, or do you want to try to phase it in some way?

MR. MUELLER: We have -- just like Mr. Sellers proposed a year, I think it would be beneficial to stage it in some way. I think the most logical way to stage it is by plant, maybe by region, but I just say by plant. It almost doesn't matter whether it's by region. And, you know, it's as good a place to start with unionized plants as anywhere else.

By the way, I think I'll come back to the plaintiffs and the Court and tell you we're going to agree to the tolling. I just can't commit to it today. We haven't talked about the case schedule if there is tolling. If that's the case, it looks like we're going to be addressing the 3(o) issue up front. And

Mr. Sellers said he wanted discovery --

THE COURT: I'm going to get to that in a minute. This may all be for naught, because you may do tolling and we may be -- have a more abbreviated schedule. But if you don't agree to tolling, you're satisfied with just having the discovery period be 12 months and then y'all work it out among yourselves as to how you stage it.

MR. MUELLER: We can do that.

THE COURT: All right.

MR. MUELLER: We've worked on lots of things together.

THE COURT: Good. And as far as -- the scheduling order will need to have a deadline for dispositive motions. I'm sure y'all can agree on that.

Initial disclosures. The plaintiffs' position is within 60 days of today, defendant's position 30 days from today.

MR. MUELLER: Court's preference.

THE COURT: Either --

MR. MUELLER: Court's preference.

THE COURT: Okay, 30 or 60.

All right. Well, let's say 60 days then. That way nobody will be tempted to come back and ask for an extension.

All right. Initial disclosures will be -- who wants to take the lead on the first draft of the order, to getting it to the other side? Plaintiffs?

MR. SELLERS: We'll be happy to do that, Your Honor.

THE COURT: All right. 60 days on the initial disclosures.

Motions for leave to amend. There seems to be no disagreement between the positions except that the plaintiffs --

MR. SELLERS: Your Honor --

THE COURT: I mean, is there going to be any joinder of other parties? Isn't it just going to be opt-in plaintiffs? I guess if you found out one of your named plaintiffs didn't really work where they said they did or something?

MR. SELLERS: Your Honor, yeah, we'd like to have some limited period of time to add additional named plaintiffs, but that is --

THE COURT: You say 45 days after initial disclosure is completed. That seems -- I mean, that's relatively short, and I would think the defendants would go along with that. I mean, the defendants don't want them to be able to name new parties six months down the road.

MR. MUELLER: I don't think they need the 45 days. I mean there's nothing we're going to say in our initial disclosures that's going to affect, you know, who their named plaintiffs should be. We're going to disclose our supervisors, you know; the kinds of documents we have, like payroll records and so on. And in the whole history of the litigation, which has been a good relationship between us, I can't understand why they need initial disclosures to amend their named plaintiffs.

MR. SELLERS: Your Honor, I'm proposing amendment to our position, which is that we would agree to any amendments of the pleadings as to plaintiffs, named plaintiffs, for -- within 45 days of today, rather than after initial disclosures.

THE COURT: All right. I'm going to allow that. But, I mean, that could -- if you add somebody, that could conceivably -- I don't want you to add somebody in one of the cases where you've already filed your motion for certification, because then it becomes a problem of who they're responding to.

MR. SELLERS: That's fine.

THE COURT: So once a motion to certify is filed, there will be no amendment of that.

MR. SELLERS: We agree.

THE COURT: Okay.

MR. MANIKLAL: So we'll do basically -- we have leave to amend to add named plaintiffs no later than 45 days or a notice motion, whichever comes first.

THE COURT: Right. No longer than 45 days from today or the date that your motion to certify is filed, whichever comes first.

MR. MANIKLAL: Right.

THE COURT: Mr. Mueller?

MR. MUELLER: If I may offer an observation on that. These seven people who were transferred from the Northern District of Alabama were transferred as individuals. In one of the cases I know we briefed -- and I think there was already a ruling on -- whether they could convert it into a collective action.

I think judicial efficiency would suggest the same sequence here; that is, Your Honor will have to decide first if they are allowed to turn an individual case into a collective action before it decides the class motion.

THE COURT: Well, I mean, they originally filed the case in the Northern District of Alabama as a collective action that would include a class of all similarly situated Tyson employees throughout the country. That court decided that that class was not

maintainable or was not going to be certified. So all of those plaintiffs' claims ended up being individual claims.

And you have not, Mr. Sellers, filed a amended complaint for those plaintiffs to maintain a collective action on a plant -- a single plant only?

MR. SELLERS: That's correct, Your Honor. Except for Arkansas, that's right.

THE COURT: Don't you need to do that?

MR. SELLERS: We did. I'm just saying Arkansas --

THE COURT: You did file an amended complaint.

MR. MANIKLAL: We have filed amended.

THE COURT: So the question is -- the court has not ruled on it yet, but you have -- for example, the cases, when they got transferred to the other divisions, other districts -- when they were transferred, they were transferred just as an individual case. And you say you have filed a motion to amend them or either have amended them?

MR. SELLERS: May Ms. Webber speak to this, Your Honor?

THE COURT: Ms. Webber?

MS. WEBBER: Thank you, Your Honor.

Of the seven transfers -- when they were

transferred, they were transferred with the original complaint, which was the nationwide complaint. And so we started the process of seeking to amend those complaints to make clear that we were narrowing to a single plant, rather than continuing to seek nationwide.

We filed motions in three of the seven transferred cases, motions for leave to amend. One of those has already been granted. The other two are still pending. We have -- we had planned to file motions for leave to amend in a similar fashion in the remaining four cases.

THE COURT: So one of the motions to amend was granted before it was transferred to MDL.

MS. WEBBER: Correct, Your Honor.

THE COURT: Well, then, for the other ones, the Court would need to decide the motion to amend before you -- before you file your motion for certification.

MR. SELLERS: That's correct.

THE COURT: All right. Well, include in the order how those are going to be handled, and specifically list them so that I won't have to go hunt them down. Specifically list that these cases, the motion to amend -- there's a motion to amend, defendants shall have --

Have they been fully briefed, or you've just filed them, or you haven't even filed the amendments yet -- the motions yet?

MS. WEBBER: They're in different stages, Your Honor. Some have been briefed, some have not, and some have not yet been filed.

THE COURT: All right. Well, just put in the scheduling order the scheduling of those, and then you'll have to address in the scheduling order how the motions to certify those -- the deadlines for the motions to certify those would need to run within so many days after the Court decides the motion to amend. Those would be outside the 30 day or rolling day.

MR. SELLERS: Right.

THE COURT: Okay. Just make sure that's clearly addressed.

That's your point, Mr. Mueller, is those motions need to be addressed first.

MR. MUELLER: Yes, sir.

THE COURT: But that shouldn't prevent you from filing the motions in the other cases under the schedule that we talked about.

MR. SELLERS: That's correct, Your Honor.

THE COURT: All right. Okay.

Protective orders. Defendants wish to just

have the Fox protective order continued? Is that right, Mr. Mueller?

MR. MUELLER: Yes, sir, or at least materially the same term so there's no confusion. We've got a large corpus of evidence already subject to one order. We just don't want to be subject to inconsistent obligations. It will very quickly be hard to follow different rules for different pieces of evidence.

THE COURT: Is there a problem with -- I mean, obviously we need one protective order.

MR. SELLERS: That's correct, Your Honor. The area that -- with which we take issue from the Fox protective order is that it provided that within 30 days after the production of what were thousands of pages of materials, we had to indicate which of those material's confidentiality designations we contested in the Fox case. That was an impossibility. We couldn't review all those documents within 30 days. And virtually every document they produced was marked confidential.

And so we're really just asking for the opportunity to modify that provision. And ultimately we may bring to the Court at some point the issue of whether some of those designations were proper. We're certainly willing to treat the documents as confidential under the Fox order unless and until the Court were to

rule otherwise, but we want a different time period within which to have to designate or challenge confidentiality designations because 30 days is just too fast.

THE COURT: Well, I'm sure that that Court's intention was that you either file your objections within 30 days or seek a modification of the 30 days. I mean, I can't imagine if you'd filed some motion saying there's no way we can do it in 30 days, the Court would not have at least considered that.

MR. SELLERS: Well --

THE COURT: Did you try that?

MR. SELLERS: I don't think so, Your Honor. We were preoccupied with --

THE COURT: Okay.

MR. SELLERS: -- reviewing the documents and other things.

THE COURT: Well, for the time being -- until the discovery period starts in these cases, new discovery, then the only issue is whether the documents that have already been produced remain confidential. And what we need is -- we don't need a confidentiality order in this MDL until discovery starts -- I mean we need it before discovery starts.

MR. SELLERS: Yeah. And, Your Honor, we're

prepared, unless and until the Court relieves us --

THE COURT: To follow the Fox order.

MR. SELLERS: We will follow the Fox order.

THE COURT: Didn't my first order cover that? Doesn't it say any protective --

MR. SELLERS: Yes.

THE COURT: -- orders that have been previously issued shall continue? I guess the question is whether that would -- well, that's going to be confusing. It may not be clear that that Fox order protects anything beyond the Fox litigation.

That's your point, Mr. Mueller --

MR. MUELLER: No --

THE COURT: -- or not?

MR. MUELLER: We have an agreement that extends it to these cases.

THE COURTR: Oh, you do? Okay.

MR. MUELLER: But I agree with Mr. Sellers that if this Court saw fit to impose a different procedure for new documents produced, the Court would certainly have the authority to do that. Our point is that that arrangement we've had was a negotiated arrangement, it's worked for years, and there's no need to change it. And it would be -- given eight years of following this process, it's a good process, and it should continue to

go forward.

THE COURT: Well, we're going to follow the Fox order unless and until it's amended by this Court, and that would require a motion on behalf of the plaintiffs. But until that -- and then the defendants can respond and I'll decide it. But until it's amended, the Fox order will be the protective order for all of these cases. All right.

I don't think there's any disagreement as to how expert discovery will be handled. Seems like that was -- except the plaintiffs wanted to be able to name rebuttal experts.

MR. SELLERS: Or just produce rebuttal reports from the same experts.

THE COURT: Well, put down in your proposed order what exactly you want and see if they'll agree with it, and hopefully you can reach agreement on that. If not, set out the differences and I'll decide it.

MR. SELLERS: Okay.

THE COURT: Proposed discovery motions. I think y'all can reach agreement on the timing of that. I didn't notice any significant dispute.

What about electronic discovery? The plaintiffs I think raised that issue.

MR. SELLERS: Your Honor, the last time we

conducted electronic discovery was eight or nine years ago, something like that. And our point is really that we would like to discuss with counsel for Tyson what, if any, additional materials they maintain in electronic format. We may or may not wish to pursue them in discovery. But the presumption made by Tyson in its submission was that the only forms of electronic discovery we would have any interest in were e-mails and pay records. And we merely want to make clear that we would like to discuss with them if there are other forms of electronically maintained materials that we'd like to pursue through discovery, and that's -- and we're happy to discuss that with them.

THE COURT: I mean, the Federal Rules provide for it. I mean, I don't --

MR. SELLERS: I would hope there's no significant difference between us over this.

THE COURT: Okay. Well, if there is, you -- I'll straighten it out. But I'm going to assume that there's going --

I mean, is there any problem that the defendants anticipate with regard to electronic discovery, Mr. Mueller?

MR. MUELLER: Well, I don't want to ever anticipate problems. I think e-mails, payroll

records --

THE COURT: I thought that's what you were paid for -- or not just you but all lawyers.

MR. MUELLER: Well, I think we'll be able to work it out. We propose to talk to them.

THE COURT: All right.

MR. MUELLER: The only thing I'm aware of that we didn't just discuss were security videotapes, which aren't very helpful in these cases, but we can talk about that.

THE COURT: All right. Well, if there's some dispute about producing it, then I'm sure y'all filed motions. Okay.

All right. Now, there should not be any opt-in filings until after -- obviously until after I rule on your initial motions for certification.

MR. SELLERS: Well, Your Honor -- I'm sorry --

THE COURT: Go ahead.

MR. SELLERS: We have had experience of people contacting us for the purpose of expressing an interest in participating in this case. It's not in any organized fashion, but if we -- I don't think we can ethically advise them to refrain from filing a notice of consent to participate until a later date, as the toll of the limitations period would continue to run on their

individual claim.

THE COURT: All right. Well, what I just want to make sure of -- either before you file your motions or what comes in afterwards -- is that what is filed with us logistically is done in such a way that it can be easily managed in our system and downloaded. And what I would think could happen -- I mean, obviously the opt-in or the consents in any future notice would be directed to you, not directed to the Court.

MR. SELLERS: That's correct.

THE COURT: So it would be your burden to put them in a format that we can download them into electronic format --

MR. SELLERS: That's correct.

THE COURT: -- here, rather than you just sending us paper and saying, "Here, you scan it and get it in your system."

MR. SELLERS: That's correct, Your Honor. We'll accept responsibility for that.

THE COURT: All right. I mean, I'm sure -- you've handled these cases --

MR. SELLERS: We have.

THE COURT: -- where there's electronic filing before.

MR. SELLERS: We have.

THE COURT: And so you at least know in those other districts how that works best.

MR. SELLERS: That's correct.

THE COURT: So before you file them, you contact Ms. Long and tell her what your -- the format you're contemplating filing them in. And then hopefully that will work in our system. If not, we'll contact our systems folks just to make it work.

I mean, if -- and I'm not suggesting this is going to happen. But if all these cases were certified, how many potential employees do we think we could possibly be talking about as potential plaintiffs?

MR. SELLERS: Your Honor, there would be thousands, depending on the number or the length of limitations period. I don't -- I can't be sure, but it certainly could be thousands.

THE COURT: What records would we need to keep in the official court record as to information regarding those plaintiffs, other than their names?

MR. SELLERS: Your Honor, what we've done in another case, if I may answer your question this way, is we have taken the consents, on which people register typically their name and perhaps some minimal other information by which they can be reached and identified, and we have -- we have reduced that to a PDF, an

electronically readable form. We've attached it to a notice of filing on a regular basis -- let's say weekly -- and then we have filed those with the -- through the electronic filing system.

So I would assume that if the Court were to certify one or more of these cases, notice were at issue and we had a series of consent people contact us and consents prepared by those people, we would file -- we would obviously work with Ms. Long, but we would intend to file in some electronically-managed form or manageable form the paper records of their consents. And then we could retain the copies of the originals, or the Court could direct us to proceed with the originals in some other fashion.

THE COURT: And during the pendency of the MDL, there's going to be no need for the Court to treat them as separate plaintiffs.

MR. SELLERS: That's correct.

THE COURT: I mean, as far as worrying about --

MR. SELLERS: That's correct.

THE COURT: Okay. So we wouldn't really need to do anything. If you can electronically file it, then it's in our system and we don't have to do anything with it.

MR. SELLERS: That's correct.

THE COURT: Except if -- well, you're going to file them in a format so they not only end up showing up as consents in the general MDL but consents in the individual cases. So that at the end of the day, when I send them back to wherever, it's going to be easy to tell, if I didn't certify a case, who all these individual plaintiffs are that have got to be sent back for individual trial?

MR. SELLERS: That's correct, Your Honor.

THE COURT: And how are you going to do -- I mean, you're going to take the -- is it going to be -- do you see it as your burden -- if you don't get a case certified, then liaison counsel and lead counsel are ultimately going to be responsible for those individual cases until you can determine which of these other plaintiffs' lawyers they came from?

MR. SELLERS: Well, Your Honor --

THE COURT: For example, if I sent -- if I didn't certify the -- let's just say the Mississippi cases, and they're not certified -- I don't know if under the MDL -- am I going to be expected to handle the individual discovery in the individual case. Okay.

MR. SELLERS: Well, Your Honor, I certainly don't mean to instruct -- advise the Court about its obligations under the MDL order, but I think the only

question would be --

THE COURT: The only thing I'm not going to do is try it.

MR. SELLERS: I believe that's correct. Otherwise, venue is proper in this court for all pretrial proceedings.

THE COURT: But at the end of the day, if the Mississippi cases don't get certified and we've done all the pretrial with regard to that, and I send them back to Mississippi, will the Mississippi court still have a record of who their lawyers were when they were in Mississippi? I guess they would.

MR. SELLERS: I believe so. And I believe --

THE COURT: I'm just thinking that when you file these -- of course, those lawyers would not have signed up to represent the opt-ins, though. If they opt in, if they consent and they didn't get certified, how is that going to work?

MR. SELLERS: Your Honor --

THE COURT: Let's say you've got a case in the Southern District of Mississippi and you've got 200 opt-ins --

MR. SELLERS: Right.

THE COURT: -- and we do all the discovery and I de-certify -- certify it and then I de-certify, and

then the discovery is done and I send it back. Who's going to represent those 200 individuals to try those cases in Mississippi?

MR. SELLERS: Your Honor, I think -- it's important to recognize that the lawyers who were representing the plaintiffs in connection with those claims in those plants before, before they were consolidated, are counsel before this Court, in addition to us. So they will be -- presumably, if those cases get returned as individual claims not certified in the Mississippi court, the lawyers who were handling those cases before and were involved in any discovery that may take place before this Court with respect to those claims will accompany those cases back to Mississippi and be handling them.

THE COURT: Well, as far as your steering committee and all that, do you plan on having some agreement with all these lawyers written as to your responsibility vis-a-vis them? I mean, is everybody consenting to you being lead counsel and liaison, all lawyers who are lawyers of record in those cases?

MR. SELLERS: It's my understanding. If the Court wants to make some -- inquire about some further representation, we can have some --

THE COURT: Well, I just don't want -- I mean,

there are probably only, what, 18 of them?

MR. SELLERS: At this point there are 18.

THE COURT: I think it would be prudent to -- well, I would have thought, if you were going to be lead counsel, you'd want some agreement with all of them so -- to protect yourself as to what you're -- but maybe not.

But it seems to me it would be -- what I don't want to happen is a couple of the decisions go bad and then some lawyer come in from Mississippi or Arkansas and say, "Well, I never agreed to this crowd representing me on the motion to certify." I mean, I think they would have waived it.

MR. SELLERS: Right.

THE COURT: But it would just make it easier if you had some written agreement that everybody's consenting to the lead counsel and -- I mean, all I've done this morning is taken you at your word, that everybody's in favor of you being lead counsel and you being liaison.

MR. SELLERS: Your Honor --

THE COURT: Yes, sir.

MR. SELLERS: -- perhaps one way to address the Court's concern would be that we have filed by counsel, who have been counsel of record in these cases in the

transferor jurisdictions, a notice with this Court indicating their assent to us serving as lead counsel. Mr. Maniklal --

THE COURT: I tell you what. As part of the pretrial -- as part of the proposed scheduling order, just prepare a short, separate order for me that says that the Court has designated you as lead and you as liaison to act on behalf of the plaintiffs in all of the cases. And that will be binding on every case. Any party that has an objection to this, any attorney, shall file it within, you know, 30 days or something.

MR. SELLERS: That's fine.

THE COURT: And just -- that'll take care of it.

MR. SELLERS: Okay. Thank you.

THE COURT: That isn't going to be a problem.

MR. MUELLER: Your Honor, if --

THE COURT: Tyson is the only defendant; right?

MR. MUELLER: I'm sorry?

THE COURT: Tyson is the only defendant, so you don't have this problem.

MR. MUELLER: That's correct, sir.

I have one issue I want to raise about the consents. We still don't have agreement on who are the

opt-ins in the Fox case. And the reason for that is when these consents are filed, there's almost never a Social Security number. And I understand that under the E-Government Act there can't be on any public filing a Social Security number; but it would be very helpful to the course of this case and the future cases, when they're transferred back, if we could get that information, because when you get a name -- you know, we have over time some 250, 300 thousand employees at any one plant. There's many, many people, sometimes with the same names or very common names. And it would be nice to address that.

THE COURT: I mean, you're going to prove your damages through their records to some extent. So it would be helpful for you on the front end to have whatever identifying information you think they probably gave their employer.

MR. SELLERS: Your Honor, I appreciate what Mr. Mueller is saying. There are people who are -- who regard the Social Security number as a private piece of information and are reluctant to disclose it to us or anyone else. I think --

THE COURT: Well, can I not place that as a condition of opting in?

MR. SELLERS: Well, the Court obviously can do

that. I would ask the Court not to do that. I think there are other ways for people to identify themselves. If there are -- when we file these consents, if there are two John Does in a particular plant, I would expect -- and we've had this happen before -- that Mr. Mueller would contact us and say, "There are two John Does in this plant during this period. Could you help us sort out which one you're dealing with?" We can go to the Mr. Doe who has contacted us and inquire about more identifying information.

THE COURT: At this point I'm not going to impose any requirement as to exactly what information you have, but the burden -- if you seek information from the defendant with regard to those employees and the defendant makes a reasonable request, we've got to have more information to identify them, then the burden is going to be on you.

MR. SELLERS: That's fair enough.

THE COURT: And if the defendant says after an initial search of the name, "We need more information," then the Court's expectation is going to be for you to provide it to them. And if that person says, "No, I can't," then --

MR. SELLERS: Right.

THE COURT: -- you know, they're out.

MR. SELLERS: Your Honor, that's fully acceptable to us. I just would like to have the flexibility to provide --

THE COURT: What I would think, Mr. Mueller, is they provide you with the name. You go through your list of the name. And if you can't identify it based on reviewing the name, then you write him a letter and tell him, "We can't identify him based on the name. We have these people in our database based upon date of birth or Social Security number or whatever, and for us to have to search it in some other method is going to cost us this." And I would likely put the burden to them to pay for that extra cost, if they don't provide you with the identifier. But I'm not going to put some barrier up that may artificially inhibit somebody from participating in the case just because they don't want to give out a Social Security number.

Now, at some point, if it is a burden for you to identify them and they still will not provide the identifier, then I won't hesitate to strike them. But we'll address it on a case-by-case -- I would think most of them, you've probably got them in your plant based on name, although I understand these people come and go and --

MR. MUELLER: Often we can't read them.

They're handwritten. And sometimes they're -- we can identify six people with the same name.

THE COURT: Well, surely you can get them to at least print under their name legibly their name.

MR. SELLERS: Your Honor, we'd certainly ask them to do that, and we can state that in the notice. If there --

THE COURT: It's just going to be more -- I mean, you've got an incentive as an attorney to do that because if they say, "I can't read it," then you're going to have to go track them down and have your paralegal or whoever do it. So I think that --

MR. SELLERS: We have every incentive to get easily read, identifiable information, Your Honor.

THE COURT: All right.

MR. MANIKLAL: Your Honor, I think the opt-in forms that we've utilized in the past -- at least the ones that we've utilized in the last year -- provide for a printed line as well as a signature line.

THE COURT: Well, really, this will be addressed when we decide -- if it's certified, what the notice will say and all that. I mean, I understand there are some people that were opting in sporadically even before, but we don't need to decide the opt-in form today.

Okay. All right. Now, if -- I think that covers most everything that seems to me needs any of my direction with regard to the scheduling order if the defendants are unwilling to stipulate to tolling.

Mr. Sellers, if they agree to stipulate to tolling, you'd agree that would be binding on them. I mean, there's nothing in the law that would say that filing within so many days is jurisdictional, so that even if they agreed to it, the Court wouldn't have jurisdiction. That's not a problem, is it?

MR. SELLERS: That's correct, it's not a problem.

THE COURT: Okay. So they can protect your potential opt-ins' rights with regard to filing a stale claim by agreeing to tolling. I mean, I'll give you a chance to argue it.

What would be the problem with addressing the 203(o) issue up front, after some limited discovery, if they agree to tolling?

MR. SELLERS: Your Honor, the only issue that I can envision is that I would like to make sure that we're not, if possible, while we're preparing the notice motions, embarked on briefing responses to lots of motions for summary judgment.

THE COURT: I think what I would do -- and this

would be our other path. If they come back tomorrow to you and say we agree to tolling, I think what I would expect then is the proposed scheduling order to have the briefing schedule for that set out up front, with very limited discovery; and then within so many days of the Court deciding those motions, you would file the motions for certification, because I wouldn't want you to -- it would defeat its purpose if you filed them before you saw the Court's ruling, because then you may would be arguing about certain things that are irrelevant.

So I would think that scheduling order would be within so many days the defendants shall have for limited discovery on the 203(o) issues by such and such; they have to file all motions for summary judgment in the unionized plant cases on that issue; you've got so many days to respond; and then within 30 days of the Court's ruling -- or however long you want to say -- on those summary judgment motions, plaintiffs shall file their motions for class certification. And I would restrict the summary judgment motions just to the 203(o) issue, not everything.

Yes, sir.

MR. SELLERS: Your Honor --

THE COURT: What's wrong with that?

MR. SELLERS: Your Honor, I'm not sure that

that will work in the sense that, number one, there's going to be -- there is going to be some significant discovery that I think we will need to take in connection with our aid of our defense of those 203(o) motions. So to -- I think the Court should not underestimate that that may take some time.

The second issue, which I want to come back to again -- I mentioned it before -- is that even if the Court were to grant the motion in its entirety, there would be a totally separate inquiry, because it won't dispose of the entirety of these claims as to whether --

THE COURT: I understand that.

MR. SELLERS: No, but the reason --

THE COURT: I understand that.

MR. SELLERS: I'm sorry. But the reason it's important is because that would mean that there would still -- the need would still exist for notice to go out even in those plants.

THE COURT: I understand that.

MR. SELLERS: So my point is that since the notice does not specify in detail the nature of the claims, there's no reason that the disposition of the 203(o) motion would affect the certification or the form of the notice that would be issued.

THE COURT: Well, but what it would affect

possibly is the Court's analysis of the -- of the motions for certification. And it could affect the description of the class.

I mean, as I -- we've handled several of these -- not MDL but several of these FLSA cases, and my recollection was that the notice did have to describe who was in the class.

MR. SELLERS: Well, that --

THE COURT: And it may or it may not. It may end up, regardless of the Court's ruling, say all line workers or whatever they're called; or it may say -- there may be some way to exclude those who change clothes only at the beginning or end of the shift. I just can't think of all the possibilities. I mean --

MR. SELLERS: Yeah. But I guess the point I'm making is that anybody who is -- who's come to the shift at the beginning and whose donning and doffing may or may not be included in the case, depending on the Court's ruling on 203(o), is still going to have claims with respect to activity in the middle of the day. Everybody had to wash their equipment. Washing is clearly -- I don't think there's any dispute about this. Washing is not covered by the clothes changing exception under 203(o). There's walking time. There's donning and doffing in the middle of the day, in the

course of unpaid breaks where people performed work, that would not be excluded by the ruling in 203(o).

And so --

THE COURT: 203(o) doesn't say putting on and removing clothing and washing before and after -- doesn't say washing?

MR. SELLERS: It's washing of the person but not of the equipment.

THE COURT: Okay. Washing the person.

MR. SELLERS: Yes. We're not -- we're not taking issue with that. But washing person is not part of the claim here. It's the washing of the equipment that's been donned and then doffed and washing it, sanitizing it --

THE COURT: You mean their equipment that they carry with them.

MR. SELLERS: That's correct.

THE COURT: Not the line, not the steel or whatever the chickens roll down.

MR. SELLERS: It's the personal equipment these people are wearing.

THE COURT: Their knives or whatever.

MR. SELLERS: Right. Or their -- you know, their helmets or their boots or their mesh gloves or aprons or things of that sort. That's the equipment

that must be washed and sanitized multiple times during the day. And the only issue that 203(o) defense addresses is what is known as the post and preliminary activity, the activity at the very beginning of the shift and the activity at the very end of the shift. All the activity in the middle of the shift is not affected by -- it would not be affected by even an adverse ruling on 203(o). That's the reason why in the Fox --

THE COURT: You think there are going to be very few cases that would --

MR. SELLERS: -- be disposed of entirely.

THE COURT: -- disposed of entirely.

MR. SELLERS: And, Your Honor, I think we have some experience with this at this point as well. In the Fox case, as we made clear in our papers, there were several individual claims, named plaintiffs, that remained before Judge Hopkins. And we now have the experience of two of those cases -- all three of them actually -- Judge Hopkins granted summary judgment pursuant to 203(o). And in all three of them the Court ruled that the time that remained was not de minimis, and the trial -- the cases proceeded to trial on all three. One of them ended in a mistrial. The other two ended in plaintiff's verdicts.

So it is not dispositive of whether those claims can go forward, and for that reason it should not affect whether or not notice would be issued. And I'm just concerned about building in a sequencing that will inevitably delay the issuance of notice.

THE COURT: Mr. Mueller --

MR. MUELLER: Do you have a question, or can I respond to that?

THE COURT: You can respond.

MR. MUELLER: Your Honor, under Hoffman, the whole point of the notice process is so that it's court-supervised and people can make intelligent decisions. The cases he just talked about, I think, make our point because they were not class cases. They were individual trials.

Certain people here, like people who do not handle -- we have two types of employees basically: food handlers and non-food handlers. As I understand it, they're all within these proposed classes, but there's different rules that apply to them.

At the beginning and end of a shift, non-food handlers do not have washing requirements. That's just a general rule. I mean, there may be some exceptions, but that's a general rule. Those people may get the notice and say, "You know, if I see that 3(o) is applied

and the Court's not considering claims for pre-imposed shift donning and doffing, and I don't do any washing myself pre- or post-shift, I don't want to join the suit," or, "I want to hire my own lawyer and file my own individual action," like the ones we just tried. That's the whole point of the notice process, to let people make that decision. And the notice should be clear about what claims are in the case, and people can make that decision. But it's no reason not to address the legal issue.

THE COURT: Well, why would -- why could you not -- why can 203(o) not be addressed in your opposition to the motion for certification by arguing that -- your first argument would be these people aren't similarly situated and, therefore, shouldn't be certified; but if you found they were similarly situated, then in certifying the class you should certify the class to exclude all persons who doffed and donned their stuff at the beginning and end of the shift under 203(o)? Why couldn't it be addressed there, and then the notice that would go out would be to employees who didn't do those things?

MR. MUELLER: Well, because you're mixing merits and class issues --

THE COURT: Well --

MR. MUELLER: -- which you're not supposed to do, and --

THE COURT: I'm trying to do it efficiently.

MR. MUELLER: I understand. Well, I think the most efficient way would be to get a ruling --

THE COURT: What's wrong with that, Mr. Sellers?

MR. SELLERS: I don't think we have any objection to that approach.

THE COURT: What would be wrong with him having the right in the certification -- arguing that if the Court does certify it, it ought to exclude from the class persons that come under 203(o) and then figure out a way to write that into the notice?

MR. SELLERS: Your Honor, as long as -- I mean, I agree with Mr. Mueller that the Court should not mix the notice with the merits, but I understand the Court's thinking to be you deal with --

THE COURT: Dividing the class.

MR. SELLERS: You divide it up. But I think -- I just again want to emphasize, although we'll address it in our briefs, that even if the Court were to rule against us on 203(o), it's -- I mean, we cite the Marshall Durbin case. There are a number of cases that are -- that we attach, in fact, that speak to the issue

that that would not be dispositive of the balance of the claims.

THE COURT: No, I know that.

MR. SELLERS: Okay.

THE COURT: But it would be indisputable in the union cases that an employee could not -- that an employee could not assert a claim, whatever the language of 203(o) is. And if the Court certified the class, why couldn't the class be defined to exclude those persons?

MR. SELLERS: Because, Your Honor --

THE COURT: You can't tell who they are?

MR. SELLERS: No, you can't tell who they are. Your Honor, the point I was trying to make is --

THE COURT: I mean, I wouldn't be throwing out your claim. It would just --

MR. SELLERS: It would -- but it -- I'm sorry.

THE COURT: Go ahead.

MR. SELLERS: It would not eliminate the entirety of their claims, so that for -- and so therefore, when the Court posits the possibility that a ruling against the plaintiffs on 203(o) would lead to the elimination of some people's claims, I think that is an extraordinarily unlikely event. We haven't seen it occur yet in any of these other cases since the Cagle's decision came down.

THE COURT: All right. This is what I'm going to do. I think trying to balance all these interests is just going to create problems, Mr. Mueller, even if you were willing to stipulate as to tolling. I'm not sure that it's going to be so clear-cut that it's going to completely eliminate the claims anyway. I don't really know at this point. But just based upon what I have seen, and having read Anderson, I think that does leave the door open that that's not dispositive of everything.

We're going to handle this in a traditional manner, where we do the certification first, and then we'll do the 203(o) summary judgment motions with regard -- in the same way we would do other dispositive motions. That may -- that may create a little more complication later on, but at the end of the day those claims will be weeded out. And by the time it gets sent to -- back to where I've got to send them, they'll know in those cases that those claims don't exist or they do.

So prepare the joint proposed scheduling order based upon exactly what we've said the last hour and a half and no need to provide an alternative, and there'll be no need to check with your client on whether they will agree to tolling.

Two other issues, and then I'll let you bring up anything that we need to bring up.

I would like what I'll call master briefs, because they would apply to all the cases, to be filed at some point early on, indicating the parties' position with regard to the legal standard for certification. In other words -- I mean, you may want to include it in your response -- individual responses with your individual motions, but I'd like to have one brief that doesn't start out arguing the facts but just says this is the legal standard for certification in all of these cases. And indicate whether your side takes the position that it's different depending upon the circuit or whether you're agreeing that -- what I think you need to do is say, "This is the Eleventh Circuit standard, here it is, and we take the position that this should be applied with regard to certification issues in every case," or, "We take the position that it's different in this circuit; and therefore, this standard should apply." I really think you can get me that brief within 30 days of the filing of the scheduling order, that master brief.

And then eventually I'm going to require the same thing with regard to 203(o), but I don't guess you need to file that this early since we've delayed

consideration of that. But I -- so within 30 days of the date that you file the scheduling order, file a brief that just sets forth the certification notice standard and whether it's different from circuit to circuit.

MR. SELLERS: Okay.

THE COURT: Shouldn't be. It's the same statute. But the supreme court does occasionally have to resolve conflicts between the different circuits, so it may be different.

I suppose, if both of you agreed that the Eleventh Circuit was the better view, then we could consent to that standard even if it's different. I don't know. But take a look at that and file a brief on that. It doesn't need -- don't need any responses or replies. Just each side file one brief.

All right. Mr. Sellers, is there anything else that we need to take up, first of all, with regard to what needs to be included in the proposed scheduling order?

MR. SELLERS: I don't think so, Your Honor.

THE COURT: All right. Mr. Mueller?

MR. MUELLER: I don't think so.

THE COURT: Okay. All right.

Any other issues we need to take up today?

We've been here two hours and 10 minutes, and I'm sure the court reporter is tired, but I'm sure if we could get this done quickly she'd rather go -- as I would -- go ahead and break for good, rather than let you get reinvigorated during a break and it take longer.

So what else, Mr. Sellers?

MR. SELLERS: Your Honor, this is merely a ministerial matter, but I wanted to call to the Court's attention that there are three motions to intervene that are pending and fully briefed and ready for disposition -- not intending to argue anything -- in the Ackles, the Dobbins, and the Buchanan cases, all of which are -- have been transferred from Alabama. These are --

THE COURT: Named --

MR. SELLERS: I'm sorry.

THE COURT: Named plaintiffs seeking to intervene?

MR. SELLERS: These are people who were -- had filed consents in the Fox case and are seeking now to intervene in those cases. In other words, these are cases that were filed, I think, before the Court de-certified the Fox case -- or denied certification of the Fox case, excuse me -- and dismissed the claims of the people -- without prejudice, of the people who had

filed consents. They are now -- they have sought to intervene in those cases that were pending involving those -- the separate cases that were filed. And those cases have now been transferred to this court, and I'm just alerting the Court that those motions for leave to intervene are pending.

THE COURT: Tell me the cases again?

MR. SELLERS: The case names are Ackles, A-c-k-l-e-s; Dobbins, D-o-b-b-i-n-s; and Buchanan, B-u-c-h-a-n-a-n.

THE COURT: And those are the Alabama cases?

MR. SELLERS: That's correct.

THE COURT: And are --

MR. SELLERS: Fully briefed.

THE COURT: So since they were not parties in those cases, their attorneys would not have been notified of this MDL or --

MR. SELLERS: No. Their attorneys are actually -- I'm sorry. Their attorneys are -- have been notified of the MDL. Their attorneys are in fact here, I believe, but they -- what they seek -- have sought to do is to have these individuals, whose claims were filed in the -- I'm sorry -- in the Fox case, and which were dismissed without prejudice -- those people have sought to intervene in the cases that involve the plants at

which they had worked, rather than having to file new actions.

THE COURT: So they didn't -- so they were actually -- they were actually consent plaintiffs.

MR. SELLERS: In the Fox case.

THE COURT: And then -- well, why didn't their case -- then they were severed out, having just individual claims.

MR. SELLERS: They were then -- their claims were dismissed without prejudice because certification was denied in the Fox case. And rather than filing --

THE COURT: Why didn't that happen to the other people in the Fox case?

MR. SELLERS: They sought to opt in as well. I'm sorry --

THE COURT: Oh, they were named plaintiffs in the Fox --

MR. SELLERS: They partici -- I'm sorry.

Go ahead. Why don't you speak to this?

MS. WEBBER: Sorry, Your Honor.

As to all the other opt-ins who were dismissed from the Fox case, they have sought to opt in to other cases rather than move to intervene.

THE COURT: Okay. So the Fox case plaintiffs that are before me were the named plaintiffs, the

original named plaintiffs.

MS. WEBBER: Correct, Your Honor.

THE COURT: And all the opt-in plaintiffs were the ones that were dismissed out.

MR. SELLERS: Correct.

MS. WEBBER: Correct, Your Honor

THE COURT: All right. And so now this opt-in plaintiff, rather than just choosing to opt in, wants to be a named plaintiff.

MS. WEBBER: And the reason for the motion to intervene, Your Honor, is because of a case in the Eleventh Circuit that suggested that was -- that intervention was an appropriate step following de-certification and trying to follow what may be controlling law for that case in Alabama.

THE COURT: That's going to prevent all those other opt-ins to file motions to intervene as named plaintiffs.

MS. WEBBER: They certainly could, Your Honor. That's not our intention --

THE COURT: I mean, their rights would be protected --

MS. WEBBER: -- as counsel for those plaintiffs.

THE COURT: Their rights would be protected if

they had the right to opt in.

MS. WEBBER: As long as an opt-in is on file, the statute of limitations is tolled and their rights are protected. There was some question in Alabama as to whether the Alabama courts would recognize a second opt-in or whether the intervention was necessary to protect their rights. And to be as protective as possible of their rights, the motions to intervene were filed, and one of them has already been granted.

THE COURT: Before it was transferred?

MS. WEBBER: Yes, before the transfer.

THE COURT: Well, didn't my original order say any motions in those other cases had to be refiled? I mean, I'm -- this is not like removal, where I'm just accepting anything that was filed in the state court.

MR. SELLERS: That's correct. We have to refile them.

THE COURT: All right. Well, I'm not going to -- as far as I'm concerned, that motion is not pending -- whoever is here for them, that motion is not pending presently and will only be considered by the Court upon the filing of a motion to intervene. And I don't want to decide something without having studied it, but I'm going to have a hard time concluding that they would have a right to intervene as a matter of

right. I don't think they would because they're protected. And as far as permissive intervention, I'm likely to be reluctant to grant that because I don't want all these other opt-in plaintiffs that were dismissed out coming in filing interventions.

But who is that that's going to be filing that motion or not? We'll hear it, but you need to file it in -- you need to file it here, if you want to pursue it.

Yes, sir, Mr. Mueller.

And obviously you'll have -- if there's some motion like that, that's not addressed by our scheduling order, then our local rules will apply, which tells you how much time you've got to respond to certain motions.

MR. MUELLER: It was not related to that. You had asked me earlier if there was anything else --

THE COURT: Well, let me make sure Mr. Sellers is finished.

Any other issues?

MR. SELLERS: No, Your Honor.

THE COURT: All right, Mr. Mueller.

MR. MUELLER: In our proposed schedule, we had obviously proposed a period of 180 days for some initial discovery. It looks like things are going to proceed a little differently.

Because of that, we proposed certain limits on discovery, such as numbers of depositions, interrogatories, and length of depositions. The question now, I think, becomes should we address this in the filing in two weeks or we should put -- should we put all that off, because it'll get affected by whether the Court certifies some or all of these cases as collective actions. I mean, it'll change everything about the scope of the discovery.

THE COURT: Well, we can -- I mean, that would be similar to the way we handle Rule 23 class actions, where you do discovery -- certification discovery and then you come back and decide what the schedule is going to be with regard to merits discovery after the certification decision is made.

If the parties are in agreement to proceeding in that manner, then just put in the scheduling order that this carries us up through the certification decision, and then within so many days after that -- I want to put some definite deadlines on you. So I would say within -- within 30 days of the Court's final certification decision, I guess with regard to the last case, the parties shall submit a proposed scheduling order that will govern discovery for the remainder of the case. But rather than just leaving it wide open,

put in the -- put in this order that within 30 days of that last certification end date you'll submit a proposed scheduling order for the rest of it.

MR. SELLERS: That's fine, Your Honor.

THE COURT: Okay. Anything else?

So I'm going to have to enter an order in each case with regard to certification.

MR. SELLERS: I believe that's correct, Your Honor, based on how this is -- how this has been set up at this point.

THE COURT: Have you handled FLSA case in the MDL setting before?

MR. SELLERS: I have.

THE COURT: Okay.

MR. SELLERS: And --

THE COURT: Have you, Mr. Mueller?

MR. MUELLER: Yes, sir.

THE COURT: Okay. Are we proceeding generally how those other cases have proceeded?

MR. MUELLER: Foundation.

MR. SELLERS: Yes.

MR. MUELLER: Makes an assumption.

MR. SELLERS: In general, yes.

THE COURT: Okay. Are there any suggested improvements?

MR. SELLERS: No. I think the Court --

THE COURT: I know Mr. Mueller has one. He wants to address his summary judgment motion first off.

MR. SELLERS: I mean, I -- to be fair, Your Honor, I think the -- this case is in a -- has some unusual features to it. And so I think the Court is handling it in a way that we think is consistent with the features of this case.

THE COURT: All right. Well, how long did it generally take those other cases to work their way through the --

MR. MUELLER: You won't like the answer.

THE COURT: Well, I don't like the -- I don't understand how the -- I mean I -- I shouldn't say.

MR. MUELLER: About --

THE COURT: How did the Northern District of Alabama case take so long to -- just sat there?

MR. SELLERS: Your Honor, it was assigned to four different judges.

THE COURT: Okay.

MR. SELLERS: And it -- we only had two years of discovery in that entire period. We briefed --

THE COURT: Some view these cases as -- when the ERISA cases come in, they say, "Oh, gosh." And then next it's the FLSA cases.

MR. DOOLITTLE: There was an agreed period of stay as well waiting on...

THE COURT: Okay. It doesn't matter at this point.

MR. SELLERS: We don't expect the same kind of circumstances --

THE COURT: Well, we're not -- we're going to move forward. I like to move things along. I mean, I typically defer to the lawyers' judgment on things that they can agree on as to how long it takes to get things done, as long as it looks like we're moving at a reasonable pace. But we certainly want to get this resolved in a fair and efficient manner so it can go back to these other judges who will have to conduct bench trials, or not.

MR. SELLERS: No, they're jury trials, Your Honor.

THE COURT: Did you get a jury trial?

MR. SELLERS: That's -- they're jury trials.

THE COURT: Okay. Didn't we try -- we tried one of these, I thought, as a bench trial.

Are all of them bench trials -- all FLSA cases are bench trials -- I mean are jury trials?

MR. SELLERS: Well, they have -- the

parties have the right to demand a jury, and not all parties exercise it, but --

THE COURT: Okay. I think that's what happened. We had a milk case involving a big dairy, and the question was whether they -- the real question was whether or not certain of them were exempt as independent contractors, as opposed to hourly employees. And I don't think we had the benefit of a jury. They must have opted for a bench trial.

Okay. Nothing else? Everybody knows their assignment, and we will expect the proposed order back two weeks from today. Make sure you send it -- you e-mail it to Ms. Long in WordPerfect format, because that's our program, and it'll make it easier for us to adjust. And we'll go from there.

MR. SELLERS: Thank you.

THE COURT: All right. We're adjourned.

(Proceedings concluded)

CERTIFICATE OF REPORTER

I, Betsy J. Peterson, Official Court Reporter of the United States District Court, in and for the Middle District of the State of Georgia, Columbus Division, a Registered Professional Reporter, do hereby CERTIFY that the foregoing proceedings were reported by me in stenographic shorthand and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete, and true record of said proceedings.

This 21st day of NovemberMay, 2007.

s/Betsy J. Peterson, RPR,CCR
Federal Official Court Reporter

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